In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 95

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE SHAW-WALKER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE COMMISSIONER

Respondent does not oppose the grant of certiorari and it recognizes that the question presented in this case is the same as that in *United States* v. *Donruss Co.*, petition for certiorari granted April 22, 1968, No. 17, this Term. The only point of disagreement is that our petition requests the Court to hold this case pending disposition of *Donruss*, whereas respondent urges that certiorari be granted and that the case be consolidated with *Donruss* for argument.

Perhaps, if the timing were more propitious,[1] the course respondent proposes would be appropriate. But to do so at the opening of the Term would delay the argument and decision of *Donruss* for several months. Our brief in that case was filed on July 1, 1968; respondent's brief, under an extended schedule, is due on August 10; and we are advised that argument is anticipated in October.

Respondent contends (memo., p. 6) that the record in the present case demonstrates far better than that in *Donruss* the alleged practical difficulties that would result from the Commissioner's position that the accumulated earnings tax is not limited to situations where tax avoidance is the "dominant," "controlling" or "impelling" purpose of an accumulation of corporate earnings. It appears, however, that the argument respondent proposes to make is that on its record there is "an absence of tax avoidance purpose" (memo., p. 6). The issue in *Donruss*, which is common to this case, arises only after the finder of fact has concluded that tax avoidance played a part in a decision to accumulate earnings. In *Donruss*, the jury expressly found tax avoidance. Here, on the other hand, the Tax Court's like finding has been reversed, and that court must, on remand, address itself to the question whether tax avoidance was present, under the guidelines established by the court of ap-

---

[1] The petition for certiorari reached respondent on May 14, in ample time for it to have filed its response before the end of the Term if it wished to seek consolidation. The filing date of the response was extended from June 13 to July 1, at the request of respondent's counsel.

peals and which our petition does not challenge. Thus, the question presented in the petition—whether a corporation can avoid imposition of the accumulated earnings tax on the ground that it had other motives for the accumulation in addition to tax avoidance—is reached only after a finding is made that there was a purpose of avoiding the income tax on dividends.

Respondent can fully protect its interest by filing an *amicus* brief in *Donruss* [2]—to which the government would consent, as we advised respondent's counsel several weeks before it filed its memorandum here. In this manner, *Donruss* may go forward with normal dispatch, without in any manner prejudicing respondent.

CONCLUSION

The Court should hold this case pending the decision of *United States* v. *Donruss Co., supra.* In the light of that decision, the Court should either grant the petition and appropriately modify the judgment of the court of appeals, or deny the petition.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1968.

---

[2] A copy of the Commissioner's brief in *Donruss* is being mailed to counsel for respondent together with this reply memorandum.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 315204 75